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* OF COUNSEL

April 20, 2007

RECEIVED

APR 23 2007

DEPT. OF ENVIRONMENTAL
CONSERVATION

VIA FEDERAL EXPRESS

Alaska Department of Environmental Conservation
Rich Sundet, Environmental Specialist
555 Cordova Street
Anchorage, Alaska 99501-2617

Re: *Response by the Skinner Corporation to the ADEC January 17, 2007,
Notice Letter (ADEC File No. 2100.38.434)*

Dear Mr. Sundet:

We represent the Skinner Corporation, a business organized under the laws of the State of Washington (Skinner Corporation or the Company). On January 17, 2007, the Alaska Department of Environmental Conservation (ADEC) sent a letter to the Skinner Corporation concerning contamination at the Alaska Real Estate Parking Lot site owned by Alaska Real Estate, Inc. and located at 717 East 4th Avenue, Anchorage (the Property).¹ Thereafter, on February 6, 2007, in response to the Company's timely request, ADEC agreed to extend the deadline for the Company's response until April 23, 2007.

The January 17, 2007 ADEC letter (hereinafter ADEC Letter) states in part that the Skinner Corporation may be "financially responsible or liable for the investigation

¹ RecKey No. 2004210926001; Ledger Code 14144960.

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and/or cleanup of any hazardous substance contamination that might be present" on the Property. (ADEC Letter at Para. 1). The ADEC Letter also requests that the Skinner Corporation respond to certain inquiries relating to the Property. Copies of the ADEC Letter and ADEC February 6, 2007 letter are attached as Exhibits A and B, respectively. The Skinner Corporation appreciates the extra time granted by ADEC so that the Company could fully investigate this matter. The Company has completed its investigation and this Letter (with exhibits) constitutes the Skinner Corporation's formal response to ADEC's Letter.

This response begins with a history of Property ownership and describes the Skinner Company's legal relationship to the Property. We then review applicable Alaska law. In sum, based on the facts in this case and our application of Alaska law to those facts, we conclude that the Skinner Corporation is neither a potentially liable nor a responsible party with regard to the Property. Accordingly, the Skinner Corporation objects to its alleged designation as a liable or responsible party and respectfully requests that ADEC determine that the Company is not a liable or responsible party with regard to the subject Property.

I. Factual Background: The Alaska Real Estate Parking Lot

A. The Skinner Corporation Was Never An Owner or Operator.

The chain of title for the Property shows that the Skinner Corporation never owned or operated the Property.² Accordingly, the Company is not a liable person under applicable Alaska law.³

² The Skinner Corporation's only relationship to the Property is based on the fact that the Skinner Corporation held a security interest on the Property because the owner of the Property owed money to the Skinner Corporation. The Company never had any ownership interest in the Property. As 46.03.826(8)(B)'s *express exemption* for holders of "an indicia of ownership primarily to protect [a] security interest" applies.

³ Under AS 46.03.822, a person has liability for releases at a "vessel or facility." A "facility" is defined for the purposes of AS 46.03.822 to include:

[A] (i) building, structure, installation, equipment, well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, aircraft, or pipe or pipeline, including a pipe into a sewer or publicly-owned treatment works; (ii) site or area at which a hazardous substance has been deposited, stored, disposed of, placed, or otherwise located; [but] ... does not include any consumer product in consumer use.

AS 46.03.826(3). Here, Skinner Corporation presumes that the "facility" at issue is synonymous with the Property, and this response uses these terms interchangeably.

B. Legal Description.

The Property is located at the corner of East 4th Avenue and Gambell Street, Anchorage, Alaska. The Property addressed is 717 East 4th Avenue and includes Lots 8A, 10, 11, and 12 of Block 26A, East Addition (RecKey No. 2004210926001; MOA 00209308-000, 00209307-000, 00209350-000, and 00209351-000).

1. Prior to 1979

In September 1947, the Property was sold by Fred J. Vagar and Mary S. Rattray d/b/a Anchorage Motors (Sellers) to Northern Commercial Company pursuant to a Warranty Deed.⁴ Exhibit C (hereinafter Exh. C). At the time of the sale, the sellers disclosed that the Bank of Alaska was the only known creditor with an interest in the Property. *Id.* The Northern Commercial Company operated various enterprises on the Property, including a tire facility. Exh. D at 11.

In May 1957, Peacock Cleaners leased a portion of the Property to operate a dry cleaning establishment. Exh. D at 9. In 1964, C&K Sanitary Cleaners operated on the Property. Exh. D at 10. It is our understanding that C&K Sanitary Cleaners took over the operation of the Peacock Cleaner's establishment.

In May 1969, Northern Commercial Tire Co. (a division of Northern Commercial Company) entered into an agreement with the City of Anchorage. Exh. E. Under the agreement, Northern Commercial Tire Co. agreed to remove or repair a substandard building located on the Property. *Id.* On May 22, 1969, the City of Anchorage sent Northern Commercial Tire Co. a letter confirming that the Northern Commercial Tire Co. had satisfied the terms of its agreement with the City. Exh. F.

At some point prior to the end of 1978, the buildings on the Property, including the dry cleaning establishment and the tire facility, were razed. Exh. D at 11.

2. 1979: Sale of the Property to Fourth Avenue Gambell Limited Partnership

In May 1979, Fourth Avenue Gambell Limited Partnership (FGLP) purchased the Property from Northern Commercial Company. Exh. G. Title to the Property passed from the Northern Commercial Company to FGLP. However, because FGLP did not pay

⁴ The Skinner Corporation has no information relating to the use of the Property before 1947.

the full purchase price, FGLP owed money to the Northern Commercial Company and signed a promissory note agreeing to make payment for the remaining balance due. As security for this debt, the Northern Commercial Company received a Deed of Trust. Exhs. G, H. Thus, the Northern Commercial Company became a secured creditor, holding only an indicia of ownership in the Property, to protect its security interest.

3. 1979 to the Present: FGLP has sole ownership and Control Over the Property

FGLP has owned the Property since 1979 and we understand that over the past 28 years the Property has been used as a parking lot. In the early 1990s, FGLP notified the Northern Commercial Company of the possible presence of hazardous substances on the Property. Exh. L. To protect its security interest (Northern Commercial Co. still held the Deed of Trust because FGLP had defaulted), the Northern Commercial Company and FGLP shared the cost of conducting an environmental investigation of the Property.

In 1994, fifteen years after FGLP purchased of the Property, the Northern Commercial Company changed its name to SC Distribution Co. Exh. I. Thereafter, on May 31, 1994, under applicable Washington law, SC Distribution Co. adopted a resolution dissolving SC Distribution, distributing assets to the sole shareholder, and requiring that all actions against SC Distribution be brought within two years. Exh. J.

On March 2, 2001, the dissolved SC Distribution Co. executed an Assignment of the [Promissory Note and] Deed of Trust from SC Distribution Co. to the Skinner Corporation. Exh. K. The assignment did not (and could not) convey any ownership interest in the Property. SC Distribution assigned only what it had: a security interest.⁵

In 2004, FGLP filed a quiet title action to clear title of the outstanding note and Deed of Trust (the 1979 purchase from Northern Commercial Company). Exh. M. In its Complaint, FGLP acknowledged that it had "sole ownership and control" over the Property since FGLP purchased the Property in 1979 (emphasis added). *Id.* In response to the quiet title action, on July 22, 2004, the Skinner Corporation voluntarily reconveyed the Company's security interest in the Property to FGLP rather than proceed with litigation. Exh. N. It is important to note that the reconveyance of a security interest

⁵ Under Washington law (applicable to Washington corporations), suit may be brought against a dissolved corporation only if (1) the claim existed prior to the dissolution, and (2) the claim is brought within two years of the corporation's dissolution. *Ballard Square Condo. Owners Assoc. v. Dynasty Constr. Co.*, 158 Wn.2d 603, 616, 146 P.3d 914, 922 (2006). Here, any claim against SC Distribution relating to its pre-1979 ownership of the Property expired in 1996.

does not affect the title to the Property which, since 1979, was held by FGLP. Thus, Skinner Corporation never had an ownership (title) interest to sell; it held only a security interest which it conveyed to the grantor, FGLP.

To the best of the Skinner Corporation's knowledge, for the past 28 years, FGLP has been the sole owner of the Property.

C. Known Owners, Operators, Lessors, and Lessees of the Property.

According to the information available to the Skinner Corporation, the following persons and entities have owned, operated, or leased all or a portion of the Property:

1. Thomas Peterkin (purchase date unknown; sold in 1941);
2. Seth B. Cook [and Edna M. Cook] (purchased in 1941; sold in 1943);
3. Chris Poulsen and Bert Schock (purchased in 1941; sold in 1943);
4. Stefanja Ulrich (purchased in 1943; interest conveyed to Northern Commercial Company in 1971);
5. Ken Hinchey (purchased in 1943; sold in 1944);
6. Donald J. Peterson (purchased in 1944; sold in 1947);
7. Fred Vagar and Mary Rattray (purchased in 1947; sold in 1947);
8. Northern Commercial Company (purchased in 1947; sold in 1979);
9. E.F. Craig on behalf of Peacock Cleaners (leased in 1957);
10. Lloyd C. Conners and Frank A. Klith on behalf of C&K Sanitary Cleaners (leased in 1964); and,
11. Fourth Avenue Gambell Limited Partnership (purchased in 1979; current owner).

See Exh. D at 8-10.

II. Skinner Corporation Is Not a Potentially Responsible or Liable Party

As stated in the ADEC's Letter, Alaska Statute (AS) 46.03.822 "establishes who is liable for contamination." Simply put, the Skinner Corporation does not come within the scope of the statute and, therefore, has no liability under AS 46.03.822.⁶

⁶ AS 46.03.822, Strict liability for the release of hazardous substances, provides in pertinent part (emphasis added):

(a) Notwithstanding any other provision or rule of law and subject only to the defenses set out in (b) of this section, the exception set out in (i) of this section, the exception set out in AS 09.65.240, and the limitation on liability provided under AS 46.03.825, the following persons are strictly liable, jointly and severally, for damages, for the costs of response, containment, removal, or remedial action incurred by the state, a municipality, or a village, and for the additional costs of a function or service, including administrative expenses for the incremental costs of providing the function or service, that are incurred by the state, a municipality, or a village, and the costs of projects or activities that are delayed or lost because of the efforts of the state, the municipality, or the village, resulting from an unpermitted release of a hazardous substance or, with respect to response costs, the substantial threat of an unpermitted release of a hazardous substance:

(1) the owner of, and the person having control over, the hazardous substance at the time of the release or threatened release; this paragraph does not apply to a consumer product in consumer use;

(2) the owner and the operator of a vessel or facility, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(3) any person who at the time of disposal of any hazardous substance owned or operated any facility or vessel at which the hazardous substances were disposed of, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(4) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by the person, other than domestic sewage, or by any other party or entity, at any facility or vessel owned or operated by another party or entity and containing hazardous substances, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance;

(5) any person who accepts or accepted any hazardous substances, other than refined oil, for transport to disposal or treatment facilities, vessels or sites selected by the person, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance.

A. Definition of a Potentially Responsible or Liable Party

The Alaska Supreme Court has described the five categories of liable persons under AS 46.03.822 as follows:

- (1) Owners or controllers of hazardous substances;
- (2) Owners and operators of the facility from which hazardous substances were released;
- (3) Owners and operators of the facility where hazardous substances were disposed of;
- (4) Arrangers; and,
- (5) Transporters.

Berg v. Popham, 113 P.3d 604 (Alaska 2005) (interpreting the five categories of liable persons under AS 46.03.822).

In light of the operative facts set out in Part I above, and the legal analysis in this Section II, it is clear that the Skinner Corporation does not fall within any of the five categories of liable persons under AS 46.03.822 and is therefore not a liable person with regard to the Alaska Real Estate Parking Lot.

B. The Skinner Corporation Is Not A Responsible Or Liable Person Under AS 46.03.822.

The Skinner Corporation is not responsible or liable for any costs associated with the unpermitted release of a hazardous substance on the Property.⁷ As further described below, the Company never owned or had control over any hazardous substance on the Property; never owned or operated the Property; never arranged for transport, disposal, or

⁷ Applicable Alaska law defines a "release" as:

[S]pilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment, including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance, but excluding (A) any release that results in exposure to persons solely within a workplace, with respect to a claim that those persons may assert against the persons' employer; and (B) emissions from the engine exhaust of a motor vehicle, rolling stock, aircraft, or vessel.

AS 46.03.826(9). A "permitted release" is a "release occurring under the authority of a valid permit issued by the department or by the Environmental Protection Agency." AS 46.03.745; AS 46.09.900(5).

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treatment of hazardous substances; and never accepted any hazardous substances for transport.

1. The Skinner Corporation is not liable under AS 46.03.822(a)(1) because it never owned or had control over any hazardous substance.

As described above in Part I.B., the Skinner Corporation has never owned, operated, or controlled the Property and the Skinner Corporation has never owned or had control over any hazardous substance on the Property.

2. The Skinner Corporation is not liable under AS 46.03.822(a)(2) or (3) because it is not a current or past owner or operator of the Property.

(a) The Skinner Corporation has never owned or operated the Property.

In 1979, Northern Commercial Company sold all of its ownership interests in the Property to FGLP and in return received partial payment and a Promissory Note secured by a Deed of Trust. This security interest is not an ownership interest in the Property. When Northern Commercial Company changed its name to SC Distribution Co. in 1994, SC Distribution Co. acquired only what Northern Commercial Company had possessed: a security interest in the Property. In turn, when SC Distribution Co. assigned the Deed of Trust to the Skinner Corporation, Skinner Corporation again acquired only what SC Distribution Co. had possessed: the same security interest in the Property.

Under Alaska statute, a person holding a security interest, is *expressly excluded* from the definition of an owner or operator:

["Owner" and "Operator"] do not include a person, who without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect that person's security interest in the vessel or facility.

AS 46.03.826(8)(B). A Deed of Trust, such as the one that, prior to its reconveyance, secured the interest in the Property, is a "security interest," and this exempts the Skinner Corporation from the definition of owner or operator under AS 46.03.826(8)(B).

A deed of trust is 'a mortgage in effect,' being only a somewhat different device for accomplishing the same purpose, creating a security interest in

land. . . . While some jurisdictions apply lien theory to mortgages and title theory to deeds of trust, many others hold that whichever theory applies to mortgages should carry over to deeds of trust. We therefore hold that a deed of trust does not move title out of the trustor, but only creates a lien.

Brand v. First Federal Sav. & Loan Ass'n of Fairbanks, 478 P.2d 829, 831-32 (Alaska 1970) (footnotes omitted) (emphasis added). See also *Parks Hiway Enterprises, LLC v. CEM Leasing, Inc.*, 995 P.2d 657 (Alaska 2000) (holding that an "owner" under AS 46.03.822 is the person actually holding title to the property).

The Skinner Corporation never participated in the management of the Property. The Skinner Corporation only held the Deed of Trust to protect its security interests in the debt that FGLP owed to the Skinner Corporation. For all the reasons noted above, the Skinner Corporation never owned or operated the Property, and has no liability under AS 46.03.822(a)(2) or (3).

(b) The Skinner Corporation acquired no "owner" liability from Northern Commercial Company or SC Distribution Co.

Because the Northern Commercial Company transferred all of its ~~ownership~~ interest in the Property to FGLP in 1979, the only remaining interest eventually passing to Skinner Corporation was a security interest in the form of a Deed of Trust. Skinner Corporation acquired no "owner" liability from Northern Commercial Company or SC Distribution Co.

3. The Skinner Corporation is not liable under AS 46.03.822(a)(4) because it never arranged for transport, disposal, or treatment.

To be liable under AS 46.03.822(a)(4), an entity must have arranged for transport, disposal, or treatment of a hazardous substance. The Skinner Corporation has never owned, operated, or controlled the Property or any activities on the Property. Moreover, the Skinner Corporation has never arranged for the transport, disposal, or treatment of any hazardous substance at the Property. *See also Berg*, 113 P.3d at 609-10 (arranger liability under AS 46.03.822(a)(4) requires some actual involvement in the decision to dispose of waste that was substantial or integral). Here, Skinner Corporation had *no* involvement in any decision about the disposal of waste to or from the Property.

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4. The Skinner Corporation is not liable under AS 46.03.822(a)(5) because it never accepted any hazardous substances for transport.

Finally, the Skinner Corporation has no liability under AS 46.03.822(a)(5) because it never accepted any hazardous substances for transport from the Property. As explained above, the Skinner Corporation never owned, operated, or controlled the Property, any activities on the Property, or any hazardous substances released on the Property.

In conclusion, the Skinner Corporation does not fall within any of the five categories of liable or responsible persons under AS 46.03.822 and, therefore, has no liability or responsibility for any release at the Property.

III. Responses to ADEC Inquiries

ADEC's January 17, 2007 letter to the Skinner Corporations poses seven questions for the evaluation of the Skinner Corporation's potential responsibility or liability at the Property. We have set forth the questions in italics below and our responses are set out immediately below each question.

1. *Provide your full name and company affiliation (if any).*

This response was prepared by Short Cressman & Burgess PLLC on behalf of the Skinner Corporation, a Washington corporation.

2. *When you owned the property, what building structures, if any, existed on the property?*

See response in Parts I.B. and II.B. above. The Skinner Corporation has never owned the Property.

3. *When you acquired the property, did you have any information whatsoever related to the historic use of the property, including information related to any businesses and/or companies that may have owned or operated the property, or leased a portion of the property (please provide ADEC with any documents you have in your possession related to historic operations at the property).*

See response in Parts I.B. and II.B. above. The Skinner Corporation never acquired the Property.

4. *Please provide any information you might have with respect to the operation of any dry cleaning establishments on the property.*

Other than the brief history (and supporting exhibits) supplied in Part I.B. above, the Skinner Corporation possesses no documentation relating to the operation of any dry cleaning establishments on the Property.

5. *Summarize your activities on the property during ownership of the property. If any hazardous substances were stored or used on site, please describe the circumstances and time frame of storage and/or use.*

See response in Parts I.B. and II.B. above. The Skinner Corporation has never had ownership of the Property.

6. *Describe how you acquired the property from Northern Commercial Company.*

See response in Parts I.B. and II.B. above. The Skinner Corporation never acquired the Property.

7. *Please provide any information you might have regarding potential or existing contamination on the property, including but not limited to:*

The Skinner Corporation is aware of the presence of hazardous substance or contamination on the Property. However, possession of such knowledge is not determinative of whether or not a person is a liable party. In this case, the Skinner Corporation never owned or controlled any hazardous substances on the Property; never owned or operated the Property; never arranged for transport, disposal, or treatment; and never accepted any hazardous substances for transport (See discussion in Part II.B. above). Thus, the Company is not a liable party at the Property site.

Nevertheless, the Company wishes to provide the following information to ADEC in the spirit of full disclosure and cooperation. In the 1990s, SC Distribution and the Skinner Corporation discussed the possibility of assigning the Deed of Trust from SC Distribution to the Skinner Corporation. Aware that FGLP had defaulted on the

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Promissory Note, the Skinner Corporation, at that time, considered the possibility of foreclosing on the Deed of Trust to acquire the Property. As part of its due diligence, as a prospective owner, the Skinner Corporation jointly funded (with the owner (GFLP)) an environmental investigation of the Property. Based on the results of that investigation (yielding information that the Property was likely contaminated), Skinner Corporation elected to not pursue any ownership interest in the Property. The environmental report received by Skinner Corporation is enclosed as Exhibit O.

- a. *When you first became aware of the existence of any hazardous substance or contamination on the property;*

See response to Question 7, above.

- b. *Whether you were aware of contamination at the property before sale;*

See response to Question 7, above.

- c. *How you became aware of the existence of any hazardous substances or contamination on the property;*

See response to Question 7, above.

- d. *What actions you took after becoming aware of the existence of contamination on the property;*

See response to Question 7, above.

- e. *Please list all site investigations and/or reports that you are aware of related to the contamination at the property (please provide copies of any information related to those investigations and/or reports).*

See response to Question 7, above.

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IV. CONCLUSION

As a matter of law the Skinner Corporation cannot be liable or responsible because it never owned the Property, never operated on the Property, and never exercised any control over the Property. Further, as a secured party, Alaskan law provides the Skinner Corporation with an express exception from such liability. Therefore, for the reasons set forth above, we respectfully request that ADEC determine that the Skinner Corporation is not a liable or responsible party at the Property.

Thank you for your attention to this matter and please contact me at (206) 682-3333 if you have any questions.

Sincerely,

SHORT CRESSMAN & BURGESS PLLC



Richard A. Du Bey

Enclosures

cc: Victoria Childs, Skinner Corporation